BRIEF FOR THE BOARD OF TRUSTEES OF THE INDIANA STATE TEACHERS' RETIREMENT FUND, IN SUPPORT OF PETITION FOR CERTIORARI

We desire to emphasize the point that if the court is reluctant to grant the petition for certiorari, it should delay action thereon until the case now pending in the Supreme Court of Michigan, entitled *City of Highland Park, et al., v. Clark, et al.,* No. 41690, is decided.

This case involves the question of whether a peremptory writ of mandamus should issue to compel the levy of taxes to support an issue of bonds made by Royal Oak No. 7 Drain District, Oakland County, Michigan. It is an original suit in the Michigan Supreme Court, as permitted by Michigan law. The issues in it are framed by the petition of City of Highland Park and other holders of bonds, and the return to an order to show cause filed by the County Drain Commissioner and Board of Supervisors. The applicants for the writ show in their petition that they are good faith holders of bonds issued by the Drain District under the same law under which the Martin Drain and Branches Drain District bonds were issued, and that the bonds are in default and cannot be paid unless taxes are levied. Similar issues to those involved in the present suit are likewise involved in the State Court action, as the bonds contain the same recitals and it is claimed that they are void even as against *bona fide* holders because the drain, so-called, is in reality a sewer, and was so held in a suit brought by one of the taxpayers in the district. (*Village of Oak Park v. Van Wagoner,* 271 Mich. 450.) We are advised that the County officers rely upon the decision in *Bloomfield Village*

Drain District, et al., v. Keefe, 119 Fed. (2) 157, and the Michigan court will have to say whether it agrees with this decision or not. We can see no way in which the Supreme Court of Michigan can reach a conclusion favorable to the issuance of a mandamus without declaring a legal proposition, which would be applicable to the bonds involved in this petition for certiorari.

For that reason, we think this is a case in which the court should properly await the decision of the State Court of last resort, as it has done where similar situations have arisen in the past. Robertson & Kirkham, in their work on *Jurisdiction of the Supreme Court of the United States,* Section 290, page 559, and Section 301, page 602, call attention to several instances where this has been done. Of particular interest as a precedent, we call the court's attention to *Michalek v. U. S. Gypsum Co.,* 288 U. S. 639, wherein the court reversed a court of appeals (76 Fed. (2) 115), after holding the application for certiorari for many months to await a decision by a state court of last resort in *Schmid v. Merchants Dispatch & Transportation Co.,* 270 N. Y. 287. By awaiting the state court decision, this court achieved a result which all must admit promoted the ends of justice and conformity with state law.

Obviously, no one can predict how soon the Michigan Supreme Court will decide the case before it. We are informed, however, that at the latest it can be expected during the current year. Consequently, there will be only a short delay.

The history of this case surely indicates considerable doubt as to whether the Circuit Court of Appeals correctly interpreted the law of Michigan. Well reasoned opinions in the District Court interpreted the local law differently. No assertion of the state of the local law on any of the subjects involved can now be more than an opinion based upon

analogies. Either side can prophesy as to what the Michigan court of last resort will say, but until it has spoken there is no certain and definite rule to be applied. From our examination of the state law, we believe that reasons predominate for predicting a conclusion favorable to bondholders. We shall present these reasons on the various points presented in the petition for certiorari.

1. *Res Judicata.* To arrive at the conclusion that a decree obtained by a taxpayer is an adjudication against bondholders, the Court of Appeals was obliged to interpret a provision of the drain law requiring joinder of the Drain Commissioner in suits to set aside drain taxes, in a manner quite remote from anything directly said by the legislature. This simple requirement of the drain law is transformed into a provision investing the Drain Commissioner and his successors in office with such representative capacity as respects holders of bonds of a drain district, that any point decided against him in a suit brought by a taxpayer to cancel his taxes becomes a judicial determination against bondholders. If any court is to interpret a state statute in a manner so utterly at variance with express language of a legislature, it ought to be the state court and not the federal court. The Michigan Supreme Court's view on the meaning of this clause ought to be awaited.

2. *Estoppel by Bond Recitals.* There can be no doubt that the principle prevails generally that a municipality is estopped as against *bona fide* holders of its bonds from claiming that they were issued for an unlawful purpose, when the bonds recite on their face full compliance with the governing law. The Circuit Court of Appeals' own prior decisions, written by eminent jurists who later became members of this court, declare this principle in unmistakable terms in *Cadillac v. Woonsocket Institute for Savings,* 58 Fed. 935, *Risley v. Howell,* 64 Fed. 453, *Kent v. Dana,* 100

Fed. 56, *Clapp v. Marice City,* 111 Fed. 103, and *Defiance v. Schmidt,* 123 Fed. 1, and the Michigan Supreme Court in *Thompson v. Village of Mecosta,* 127 Mich. 522, followed these decisions.

Yet the Court of Appeals, we think, in effect says this principle does not apply in Michigan. It rejects the two leading cases in Michigan, *Thompson v. Mecosta (supra),* and *Schmid v. Village of Frankfort,* 131 Mich. 197, saying that they do not establish the principle in Michigan, because the village themselves took part in a false recital. This distinction is veiled in mystery. The Court of Appeals does not see fit to explain how a village can take part in a false recital, unless some officer or group of officers perform the act of making the recital in behalf of the village. The village as a corporate entity can do nothing except through agents. While in these cases the court properly called attention to the fact that citizens to some extent knew of the real purpose of the promoters of the scheme to use public credit for private advantage, as having a bearing on the equities of the case, the opinions of the Michigan court in deciding those cases contain no indication that the decision would have been any different without such knowledge on the part of the citizens. Neither the Michigan court, nor any other, has ever limited the application of the estoppel doctrine by the degree to which citizens of the community knew that their officials intended to abuse the power to issue bonds. It is our understanding that a municipality, like any other corporation, must accept responsibility for the acts of its agents who are placed in a position to make representations in its behalf. It cannot accept the benefits of such agents' acts, and repudiate attendant obligations. The same equities arise against taxpayers in drain districts. No drain can be constructed without the affirmative acts of a substantial number of the taxpayers. No drain tax can

be imposed except after wide publicity given to the proceedings and extended opportunity to raise objections.

These decisions of the Michigan Supreme Court, and others which the Court of Appeals ignores entirely, cannot be so lightly disregarded. If they are to be overruled, or their authority diminished, it should rest with the Michigan court of last resort, rather than the Federal Court, to destroy their effect.

3. *Immunity of Drain Proceedings to Collateral Attack.* The Court of Appeals ignored entirely the proposition that these bonds were acquired under a provision of the law forbidding any court to question the validity of the drain in a collateral suit. Although briefs in the Court of Appeals clearly presented the proposition, together with the legal principle applicable in Michigan protecting parties who acquire rights on the strength of statutory provisions and their judicial interpretations, the Court of Appeals gave no consideration to that phase of the case.

The drain law was so drawn as to require all who would contest the proceedings to do so promptly, and at a time when there could be correction of any matters questioned. The law was designed to avoid the injustice of throwing the cost of drainage improvements upon creditors of the district after the land owners had secured the benefits.

The Michigan court has never indicated that this statute, and the interpretations placed upon it in *Township of Clarence v. Dickinson,* 151 Mich. 270, and *Stellwagen v. Dingman,* 229 Mich. 159, and the protective principle declared in *Pittsburgh etc. Iron Co. v. L. S. Iron Co.,* 118 Mich. 109, and *Donohue v. Russell,* 264 Mich. 217, should be ignored. Until the Michigan court so declares, this statute and these decisions are part of the law of Michigan, and any decision in this or a similar case against the rights of bondholders must recognize them.

4. *Is There Any Real Illegality in These Drain Bonds?* The whole foundation of the effort to repudiate these bonds rests upon a legal quibble that the Martin Drain & Branches is not a drain, as it is called in the bonds and the proceedings,—that it is, in fact, a sewer. No legal principle is announced in any Michigan decision that a drain commissioner, acting on behalf of a drain district, may not build an underground drain of a capacity sufficient to drain the district, merely because such a structure might be used to transport sanitary sewage.

If this is not a drain, what is lacking? How should it have been constructed to avoid the present condemnation? The Court of Appeals does not say, and we are left in the dark as to why more than one million dollars worth of bonds should be declared invalid. The Michigan court has said, in *Detroit Trust Co. v. Dingman,* 291 Mich. 170, that the same law under which these proceedings were taken authorized the building of underground structures of this type, even though intended to remove sewage along with the drainage water. The Court of Appeals will not recognize this decision as of any force, because it related to a different drain. We submit that this distinction is as inconclusive as the distinctions applied to *Thompson v. Mecosta,* 127 Mich. 522.

If this court should believe that *Detroit Trust Co. v. Dingman (supra)* is limited to the particular improvement considered in that case, would it not be advisable to await the word of the Michigan court in the pending case relating to the Royal Oak No. 7 Drain? Unless it decides the case for bondholders on one of the other grounds mentioned herein, it will have to say whether the drain considered in the Detroit Trust Company case stands as an exception and is ruled by different legal principles, or whether the decision is, as it purports to be, a general inter-

pretation of the statute declaring the kind of a structure authorized thereunder.

Since there is an entire absence of decisive declarations of any Michigan court on any of the subjects dealt with in the Court of Appeals decision, we submit that the policy of this court to prevent federal courts from exercising an independent judgment in matters of local law ought to impel this court to take such action as would preserve the *status quo* in this case, so that the Michigan decision expected within a few months can be given effect.

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